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## POWER OF CONGRESS TO REQUIRE CARS MOVING INTRASTATE FREIGHT ON A RAILROAD ENGAGED IN INTERSTATE TRAFFIC TO BE EQUIPPED WITH SAFETY APPLIANCES.

It is stated by Justice Van Devanter, speaking for the entire bench in Southern Railway Company v. United States, 32 Sup. Ct. 2, that by the act of March, 1903, amending the earlier safety appliance act, Congress meant to require all cars used on "any railroad engaged in interstate commerce" to be equipped as that act requires, whether the cars were moving intrastate or interstate traffic. In other words, it was "intended to embrace all locomotives, cars and similar vehicles used on any railroad which is a highway of interstate commerce."

This puts aside all reasoning about mixed trains and other refinements railroad attorneys have cudgelled their brains about and, though the decision by the court below might have been affirmed on the mixed train theory, the court cuts the "Gordian Knot" by saying, in effect, that is an immaterial consideration. This time it is well to have the court adopt a broader premise than the necessities of the case demanded.

But to see with what ease the learned justice upholds the power of Congress to declare the broader proposition is something of a literary treat.

That it has this large power is, says the justice, "not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

Then he thus proceeds: "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge. Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one of its operatives is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others."

The learned justice cites not a single authority and bases his conclusion of the power of Congress to thus legislate purely and solely upon the well-known methods railroads have of doing business.

This may be good argument against a railroad when it objects to safety appliances on cars not used in interstate traffic being required, except that legislation of this kind would not seem to depend on the principle of estoppel.

In other words, may it be said that, inasmuch as railroads do business, as the learned justice says they do, so as to make every branch "interdependent," this gives Congress the right to declare that on all

cars they shall use safety appliances, when but for such method it would have no such right?

It seems to us, that it ought to be argued whether or not Congress can occupy the ground the justice says it occupies, and thus deprive the state from prescribing in reference to cars, or trains, moving only in intrastate traffic.

Argued from this standpoint the court would not speak of how railroads actually conduct business, but it would ask itself whether this is the only practicable way to conduct that business.

Suppose, for example, a state statute were more onerous in respect to safety appliances than Congress enacts, would not the burden be upon the railroad to show that intrastate and interstate business is not only "interdependent," but it can be conducted in no other way with due regard to the railroad discharging its interstate duties?

If this is true, then the things of which the learned justice takes judicial notice, may or may not be sufficient, necessarily, for his conclusion. He assumes because railroads do as they do, there is no other way to do.

This comment proceeds from a sort of inner consciousness of the inconclusiveness of the reasoning pursued, making one feel that it seems so easy for state control to be misplaced, when interstate traffic may be affected, and not because it, necessarily, will be affected.

In this case it may be that there is no other way for an interstate railroad to conduct its business than making all traffic "interdependent," but the fault in the opinion seems to be that the learned justice appears not to care to inquire whether this interdependence is a necessity of the situation or not. In other words, what's the odds, whether state control is trenched on or not? Here is a pretty fight between the railroads and the government, and the state is a negligible quantity.

## NOTES OF IMPORTANT DECISIONS

INSURANCE — TEMPORARY ABSENCE FROM BUSINESS FORFEITING INSURANCE UNDER IRON SAFE CLAUSE.—In Joffe & Mankowitz v. Niagara Ins. Co., 81 Atl. 281, decided by Maryland Courts of Appeals, we find a case decided by a court, which says it has "repudiated the principle of interpretation adopted in some cases that insurance contracts are to be construed more strongly against the underwriters, and adopted the sounder view that the intention of the parties, as gathered from the whole instrument, must prevail."

Being thus freed from the principle which is so greatly, and in many cases so extremely, followed by other courts, it arrived at the conclusion, that where a fire occurred in a store at the noon hour, when the store was closed for half an hour, and the books during that interval were not placed in an iron safe, the insurer was not liable. The clause in the policy said the books should be "securely locked in a fire-proof safe at night and at all times when the building mentioned in this policy is not actually open for business."

The court said: "It cannot be correctly said that a store is 'actually open for business' when it is actually locked up, with no one in it, for half an hour, and no one there to attend to business or protect the property."

The court admits there are cases seemingly against its holding, except that none goes as far as it is asked to go to sustain the claim of the insured in this case.

It seems to us, however, that the court might have sustained insured's claim upon the ground that only such closing of the store and absence was meant as reasonably might be expected to allow a fire to get beyond control. In this case the party in charge went to lunch nearby and expected to be gone only 20 minutes or half an hour. The fire did gain such headway as to consume the stock, before it could be extinguished.

It further appears, that it was not the custom for anyone to be absent from the store, but there were peculiar circumstances, not, however, imperative in their nature, whereby this chance occurred.

It would have been no stretch of construction to have said, that it would be so very improbable for a fire to start and gain uncontrolled headway in such a brief period that such an absence was not in the contemplation of parties, especially as the proof showed that it was altogether outside of the custom of the parties for the absence to occur. This brief absence seems to us to come under the rule of de minimis.

## AUTHORIZING A FEDERAL COMMISSION TO FIX RATES OF INTERSTATE CARRIERS IS NOT A DELEGATION OF CONGRESSIONAL LEGISLATIVE POWER IN THE CONSTITUTIONAL SENSE.

The subject of federal regulation of interstate rates has received a great deal of attention during the last decade, especially among lawyers, legislators, railroad men and shippers. It has become more interesting and important by virtue of the Act of June 18, 1910,[1] which authorized and empowered the Interstate Commerce Commission, under certain circumstances and conditions, to prescribe future maximum rates to be charged by certain carriers engaged in interstate commerce.

The constitutionality of this authority to fix rates has not yet been judicially determined; except that it has been incidentally passed upon in the case of Atchison, Topeka and Santa Fe Railway Company et al., against the United States,[2] wherein the court held, in passing upon and granting an application for a temporary injunction against enforcement of an order of the Interstate Commerce Commission, that the "long and short" haul provision of the Act was constitutional, upon the ground that a sufficient "standard" was prescribed elsewhere in the Act; but said that this provision would be unconstitutional as an unlawful delegation of legislative power if no standard were given to guide the exercise of the Commission's discretion. This case will doubtless eventually be carried to the United States Supreme Court. Will that court in this or any other case that may come before it, sustain the constitutionality of the rate-fixing authority conferred upon the commission? If so, will the principle referred to in the case just mentioned constitute a sound basis for its decision? The question thus presented may be stated in this form: Is the fixing of rates by public authority purely and exclusively a legislative act; or can it be properly considered an executive or administrative act, under certain conditions.

Courts have spoken of rate-making as a legislative act.[3] The thing done, however, is the fixing of a price or return for the use of property in which the public has an interest, or for the rendition of a public service connected therewith. As fixing of rates, at common law, was within the power of the common carrier, the right to fix them being derived from the sovereign, it can hardly be said with accuracy that in so doing common carriers have been exercising strictly legislative power. Although the right of interstate railroads to impose charges, the company fixing the amount, is derived from the state, can it be successfully maintained that Congress in regulating interstate commerce cannot transfer the matter of fixing the amount of the rates from the carrier to a federal commission, without having delegated constitutional legislative power, when power over such rates is no longer in the states? Conceding that Congress has power to fix rates itself, and that when it does so, it is exercising a power granted by the Constitution, it does not necessarily follow that a commission in fixing rates would be exercising a delegated legislative power, when it is merely doing what the carriers have done as long as common carriers have existed.

There are analogous matters and things which Congress may either perform itself, or make provision for performance through executive action under appropriate general legislation. If it is found that the principle controlling in such cases can be consistently applied to the rate-making function when exercised by an executive agency we are justified in inferring that the rate law under consideration is constitutional. To state this principle as applicable to the point under discussion—when Congress fixes a sufficient standard of rates, the matter of determining what rates fall within the standard is properly an executive or administrative act; and there is no grant of legislative power by way of exception to the principle against delegation, notwith-

(1) Sec. 15, of Act to Regulate Commerce, as amended (36 Stat. at Large, 551). The maximum rate making authority was first conferred on the Interstate Commerce Commission by Act of June 29, 1906 (34 Stat. at Large, 584), which authorized it to fix maximum rates upon complaint only.

(2) No. 50, before the United States Commerce Court.

(3) Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 494; Same v. Alabama Midland R. R. Co., 168 U. S. 144, 162; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 397; Texas, etc. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 216.

standing it would be competent for Congress itself to fix rates.

The right of Congress to delegate to the courts the power of prescribing the modes of procedure, on which Congress may legislate directly, such as the making of rules directing the return of writs or process, the filing of declarations and other pleadings, and other things of that nature has been sustained.[4] The constitutionality of the tariff act of 1890, which provided that the president when he had ascertained certain facts to exist, might declare the suspension of a portion of the act within the limits therein prescribed, which suspension Congress had declared should occur, was sustained by the court.[5]

It has been said that the power of Congress over interstate commerce is as excessive as over foreign commerce.[6] The action of the secretary of the treasury, taken upon the recommendation of a board of experts, in fixing and establishing standards of tea, Congress having declared to be unlawful the importation of any teas inferior to the standards so established, was an executive act. It was said such legislation "does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave the executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."[7]

Congress having declared that navigation shall be free from unreasonable obstructions, it may authorize the secretary of war to determine what particular cases come within the prohibition, without delegating, in a constitutional sense, legislative or judicial power to him. Under the statute when he has "good reason to believe" that any bridge over navigable waters of the United States is an unreasonable obstruction, he may require changes to be made after notice and hearing. Failure or refusal to make the changes required, by the bridge proprietors is made a misdemeanor by the statute. And this notwithstanding the state charter gave lawfulness to the structure, and although at the time it was built it was not contrary to the then existing federal law. The bridge was built subject to the exercise of this power of Congress, and the owners must be held to have had in contemplation that Congress might exercise its paramount power.[8]

There was no delegation of legislative power of Congress in a statute providing that after a date named, which date might be postponed by the Interstate Commerce Commission, only cars equipped with draw bars of uniform height and standard to be declared by the commission upon the recommendation of the Railway Association, might be used in interstate commerce.[9] In this case it was held that Congress, not satisfied with the common law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery and appliances, had prescribed and defined the duty by enacting that no cars, either loaded or unloaded, should be used in interstate traffic which did not comply with the standard so fixed.

It is inexpedient and impracticable to have railroad rates fixed in each instance by statute, because Congress has many other duties, is not always in session, and cannot by direct legislation provide adequately for the varying conditions of trade. As was said in the case involving the standards of tea fixed by the secretary of the treasury—to deny to Congress the right to exercise the power to delegate a duty of this character would exclude Congress from all practical supervision over the subject. This necessity existing, there is no violation of the rule as to division of powers of government among three departments, for that rule is intended to be declaratory, and not to fetter and control.[10]

What has been done in authorizing a commission to fix rates is that Congress ordains the principle and standard of requirements, that is, establishes the rules of conduct, under which commerce may be

(4) Wayman v. Southard, 10 Wh. 1, 46; Bank v. Halstead, 10 Wh. 51, 60.

(5) Field v. Clark, 143 U. S. 649, 693.

(6) Crutcher v. Kentucky, 141 U. S. 47, 57; See also Brown v. Houston, 114 U. S. 622, 630.

(7) Buttfield v. Stranahan, 192 U. S. 470, 496.

(8) Monongahela Bridge Co. v. United States, 216 U. S. 177; Union Bridge Co. v. United States, 204 U. S. 364, 382.

(9) St. Louis & Iron Mountain Ry. Co. v. Taylor, 210 U. S. 281, 287.

(10) Dreyer v. Illinois, 187 U. S. 71, 84; Prentis v. Atlantic Coast Line Co., 211 U. S. 210; Michigan Central R. R. Co. v. Powers, 201 U. S. 245, 294; Wright v. Nagle, 101 U. S. 791, 794.

carried on. The statute is a legislative announcement of what the rule is; the action of the commission is execution of the legislation, by applying the law to concrete cases, and making discovery in advance. The finding of the commission is a continuing certificate that such and such rate is within or without the statute. The commission's order in no sense makes a violation of the law; its finding looks only to the future and enables carriers and patrons to know in concrete terms what is the law in its application to their situation.

This indirect method of controlling prices for carriage upon highways is in accordance with the practice of Parliament, for by a statute of William and Mary[11] there was conferred upon justices of the peace, acting administratively, the power annually "to assess and rate the prices of all land carriage of goods whatsoever, to be brought into any place or places within their respective limits and jurisdictions, by any common carrier or wagoner; and the rates and assessments so made to certify to the several mayors, and other chief officers of each respective market town, to which all persons may resort for their information; and that no such common wagoner or carrier shall take for carriage of such goods and merchandises above the rates and prices set, upon paid to forfeit for every such offense the sum of five pounds."

If conditions were then such in the business of transportation that it was found expedient to commit to subordinate governmental agencies the fixing of rates for public carriage rather than to establish such rates by general laws, it needs no argument, with the enormous growth of trade and commerce, over great areas and by thousands of different routes and systems in this country, to show how much greater is the necessity and reason not only for regulating, but for intrusting the details of rate-making to an administrative commission.

A number of well-considered cases in the state and federal courts shows that state legislatures may authorize their creatures, that is, corporations, to fix rates, or, having conferred that power, may withdraw a portion of it by conferring upon a government commission or subordinate state official power to prescribe rates, thereby severing, to that extent, the control over rendition of a public service from control over the amount of compensation to be received therefor; without delegating legislative power or depriving of property without compensation or due process of law.[12] Where a state constitution made a division of governmental powers among three departments very similar to the division of federal powers by the United States Constitution, and a commission, acting under legislative authority, fixed a schedule of maximum rates for transportation of freights and passengers, the federal circuit court upheld the commission's rate on the ground that there was no inherent vice in giving such power to a commission, and that it invaded no rights.[13] There is no express prohibition in the Constitution against and delegation of power by Congress; its limitation in that regard arises from the fundamental rule of law that legislative power cannot be delegated, which is the same limitation preventing delegation of legislative power by state legislatures.

When occasion has arisen, with the federal government, for the performance of functions similar in nature to that of rate-making, it has been found necessary to resort to the use of subordinate officers or agencies. By the act of July 24, 1866,[14] the postmaster general was authorized to fix rates on telegraphic communications between the federal departments. Authority conferred upon the secretary of war by act of Congress, to establish rates for army transportation by a railroad company or-

(11) 3 Wm. & M., C. 12, Sec. 24; See Bacon's Abridg., 160.

(12) Railroad Commission Cases, 116 U. S. 307; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota, 134 U. S. 418; Chicago & Northwestern Ry. Co. v. Dey, 35 Fed. Rep. 866; Steenerson v. Great Northern Ry. Co., 69 Minn. 353; Tilley v. Savannah, Florida & Western Ry. Co. et al., 5 Fed. Rep. 641 (4 Woods, 427); Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167; McWhorter v. Pensacola & Atlantic R. R. Co., 24 Fla. 417, 471; Chicago, Milwaukee & St. Paul Ry. Co. v. Becker, 32 Fed. Rep. 849; Chicago, Burlington & Quincy R. Co. v. Jones, 149 Ill. 361; Minneapolis & St. Louis R. Co. v. Minnesota, 186 U. S. 257; Dow v. Beidleman, 125 U. S. 680; Oregon R. & Nav. Co. v. Campbell, 173 Fed. Rep. 957; Same v. Same, 177 Fed. Rep. 318; Georgia R. R. Co. v. Smith, 70 Ga. 694.

(13) Oregon R. & Nav. Co. v. Campbell, 173 Fed. Rep. 957; Same v. Same, 177 Fed. Rep. 318.

(14) Revised Statutes of United States, sec. 5266.

ganized under a federal statute, was held valid. In this case no question was made of the reasonableness of the rate so fixed, which was taken to be reasonable. It was claimed that the charter gave the company the absolute right to fix and determine its rates. The court did not sustain this contention. Although the United States stood, so far as the particular traffic rendered was concerned, in the position of a patron, its power to prescribe the rate was based upon an exercise of sovereignty, as the government cannot any more than an individual, compel another to enter into a contract against his will, the court expressly affirming that the "power of regulating which a state has over railroad charges on traffic entirely within its boundaries, Congress possesses when the traffic is between states, or between states and territories, or in territories."[15]

In the first case construing the provisions of the interstate commerce act, the court said that the federal commission performs the same functions as to interstate commerce that state commissions perform for intrastate commerce, and the validity of their action stands on the same footing.[16] It is also to be observed that in its composition, the Interstate Commerce Commission does not conform to the constitutional requirements of a court; nor is it a committee or adjunct of Congress. It is an administrative body, also possessing quasi-judicial powers, and is expressly authorized and required to do many things. But at no time can it decide a "case" or "controversy," whose decision is vested in the courts; but it is competent for Congress to invest it with power to take preliminary action upon certain matters, giving its action a standing in the courts.[17]

Many of its functions have been judicially approved; for example, by virtue of the so-called "immunity laws," the commission may make full inquiries unhampered and unrestricted by claims of witnesses of the privilege of refusing to testify under the Fifth amendment, concerning matters tending to criminate them.[18] It may make inquiries into the affairs of state corporations, partaking of the nature of visitatorial power, when the inquiry relates to any matters under investigation.[19] Its order as to distribution of freight cars to mines was sustained.[20] Compliance with the standard of height of drawbars fixed by it has been enforced.[21] It may require physical connection between common carriers subject to the act and lateral or branch lines,[22] which is a new right created by the statute.[23] It may also establish through routes and prescribe divisions of rates therefor whenever the carriers have refused or neglected to establish them voluntarily.[24] The similarity between this function and rate-making is apparent. The claim that this was an exercise of legislative power by delegation has been negatived.[25]

The question here is whether the fixing of rates for interstate commerce through a commission, as well as performance of the functions mentioned in the preceding paragraph, is constitutional? Because of the complexity and detail of the subject matter, the use of commissions has universally been found expedient and necessary to provide for the regulation of railroad rates. A commission is usually an expert permanent body, not burdened with other duties, and free from mere questions of policy, as it must conform to the law of its creation and authority. It certainly cannot be open to argument at this late day that the end is not legitimate.

The discussion up to this point herein has been based upon the assumption that Congress has fixed a sufficient standard of rates, and the purpose has been to show

(15) Atlantic & Pacific Ry. Co. v. United States, 76 Fed. Rep. 186, 192.

(16) Kentucky, etc., Bridge Co. v. Louisville & Nashville R. Co., 37 Fed. Rep. 567, 613.

(17) Kentucky, etc., Bridge Co. v. Louisville & Nashville R. Co., 37 Fed. Rep. 567; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. Rep. 645, 650; Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry. Co., 218 U. S. 88; Same v. Delaware, Lackawanna & Western R. R. Co., 220 U. S. 235.

(18) Brown v. Walker, 161 U. S. 591; Hale v. Henkel, 201 U. S. 43, 76.

(19) Hale v. Henkel, 201 U. S. 43.

(20) Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452.

(21) St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S. 281.

(22) Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R. Co., 216 U. S. 531; and see section 1 of Act to Regulate Commerce, as amended June 18, 1910 (36 Stat. at Large, 551).

(23) Wisconsin, Minnesota & Pacific R. R. Co. v. Jacobson, 179 U. S. 288.

(24) Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538.

(25) Illinois Central R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 465.

that the matter of determining what rates will come within the standard so fixed is then properly an executive or administrative function. We should next consider, then, whether the Act of June 18, 1910,[26] actually does fix the necessary standard on which the commission may base its action.

Common carriers in this country, in the absence of governmental regulation, are subject to the common law rule that their rates must be just and reasonable.[27] There has been some contrariety of opinion whether by that law discriminations and preferences in rates gave rise to an action for damages, when the rate charged was in and of itself reasonable.[28] It is upon common carriers thus conducting their interstate business that the regulatory power of Congress is applied. In the absence of congressional action on the subject, these carriers conduct their interstate commerce under these rules of the common law.[29]

The act requires that all charges made for services rendered in the transportation of interstate commerce must be "just and reasonable"; and every "unjust and unreasonable" charge for such services is prohibited and declared to be unlawful. It is the duty of interstate carriers to establish just and reasonable rates applicable to the operation of through routes. It is their duty to establish, observe and enforce just and reasonable classifications of property for transportation with reference to which rates, tariffs and regulations and practices are, or may be made or prescribed;[30] and just and reasonable regulations and practices affecting classifications, rates, tariffs, and so forth, which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property in interstate commerce upon just and reasonable terms, must be enforced. It is the duty of every common carrier to comply with the orders of the commission.[31] Every unjust and unreasonable classification, regulation and practice with reference to interstate commerce is prohibited and declared to be unlawful.[32] There are the express provisions of the act prescribing the standards or bases upon which interstate rates must be constructed, and prohibiting and declaring to be unlawful any rates not in accordance therewith. By these provisions extortionate or confiscatory rates are, as matter of federal law, made illegal; and only rates which are above the confiscatory point and below the extortionate point, are legal. As between the carrier and patron themselves, rates must be absolutely reasonable.

Congress has gone further, and prescribed certain limitations under which such rates may be constructed. Unjust discriminations, that is, receiving greater or less compensation from one person than another for transportation of like kind of traffic under substantially similar circumstances and conditions, by rebates or other devices, are prohibited.[33] This provision changes the common law.[34] Undue or unreasonable preferences or advantages to, and undue or unreasonable prejudices or disadvantages against persons, places, or traffic, in any respect whatever, are unlawful. It is made a positive duty to afford reasonable, proper and equal facilities for the interchange of traffic between the lines of connecting interstate carriers; and discriminations in their rates and charges between such connecting carriers is forbidden.[35] The receipt of greater compensation for a short than for a long haul, or for a through rate than the aggregate of the intermediate rates, is also prohibited.[36] These provisions require that rates for given persons, places, and commodities shall be reasonable in their relation to rates for other persons, places and commodities. Hence, a rate to be legal under

(26) Supra, Note 1.

(27) Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 43 Fed. Rep. 37; affirmed in 145 U. S. 263; Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 494; Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 197.

(28) Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 439; Parsons v. Chicago & Northwestern Ry. Co., 167 U. S. 447, 455; Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 263, 275.

(29) Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 43 Fed. Rep. 37, 50; affirmed in 145 U. S. 263; Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 197.

(30) Sec. 1 of Act to Regulate Commerce, as amended; see Note 1.

(31) Sec. 16 of same Act.

(32) Sec. 1 of same Act.

(33) Sec. 2 of same Act.

(34) United States v. Delaware, etc., R. Co. 40 Fed. Rep. 101, 103; Lindquist v. Grand Trunk Western R. Co., 121 Fed. Rep. 915; Interstate Commerce Commission v. Brimson, 154 U. S. 447.

(35) Sec. 3 of Act to Regulate Commerce, as amended.

(36) Sec. 4 of same Act; see Note 2.

the statute must not only be reasonable in and of itself as between the carrier and patron, but relatively reasonable as compared with other lawful rates. These enactments constitute a sufficient standard on which action by the commission may be taken. Although to provide that charges shall be just and reasonable and a departure therefrom constitutes a crime is not sufficiently certain and definite to answer the requirements of criminal law, yet it has been held to make the same provision as the basis of authority of a commission to fix rates is sufficiently definite.[37] When it is provided by statute that if a carrier charges in excess of just and reasonable compensation, it will be guilty of extortion and punishable criminally therefor, the time of determining the question of reasonableness is postponed until after the charge has been imposed, and no one can know in advance what a court or jury may regard as reasonable; whereas, under a statute declaring that only just and reasonable rates shall be charged and authorizing a commission to determine and prescribe what rates fall within that description, the question is determined so far as the carrier is concerned prior to the imposition of the charge. This is a distinction to be drawn between such standard as a basis for the action of a governmental agency, and for the conduct of private individuals.

The requirements that have been enumerated plainly operate as limitations also upon the commission.[38] Jurisdiction has not been placed in the hands of the commission to make general maximum rates for all commodities between all points. The distinction between a general power to fix rates and to amend specific rates seems to be that if in case of an order prescribing a scheme of maximum rates they would fail to produce adequate return for the operation of the railroad, that fact in and of itself, would demonstrate the unreasonableness of the order; whereas, in case of a particular rate, if it can be regarded as for the use of a facility, the rate is not necessarily to be regarded as confiscatory because it cannot be shown that the compensation fixed for the specific service, does not amount to an adequate return therefor.[39] The action of the commission is merely amendatory. Its changes must be predicated upon a finding of unreasonableness or unlawfulness of existing rates.[40] A rate fixed by the commission must not be below the confiscatory point nor above the extortionate point; and must be just and reasonable as compared with other rates. It is not a delegation of legislative power to authorize an executive officer or board to determine the reasonableness of a matter or thing in its relation to other matters and things.[41]

The orders of the commission are self-executing; that is, upon their being regularly made they become positive rules of conduct.[42] In express terms the statute requires that the maximum fixed by the commission be not exceeded by carriers.[43] Congress has established the rule governing all rates, and the commission completes the act by declaring what rates will conform to the rule. The rates thus finally ascertained become the "law of the land" with the same force and efficacy as if the figures in the commission's order were written in the statute.[44] In the absence of the order of the commission being set aside, the rates fixed therein are the only amounts the carrier is entitled to receive for services actually rendered.[45] They are the only rates that the

(37) Chicago, Burlington & Quincy R. R. Co. v. People, 77 Ill. 443, 447; Same v. Jones, 149 Ill. 361, 375; Louisville & Nashville R. R. Co. v. Kentucky, 99 Ky. 133, 136; Oregon R. & Nav. Co. v. Campbell, 173 Fed. Rep. 957; Same v. Same, 177 Fed. Rep. 318; Louisville & Nashville R. Co. v. Railroad Commission of Tennessee, 19 Fed. Rep. 679, 691.

(38) Missouri, Kansas & Texas R. Co. v. Interstate Commerce Commission, 164 Fed. Rep. 645, 648.

(39) Atlantic Coast Line Co. v. North Carolina Corp. Commission, 206 U. S. 1, 25.

(40) Sec. 15 of Act to Regulate Commerce, as amended.

(41) Monongahela Bridge Co. v. United States, 216 U. S. 177; Oregon R. & Nav. Co. v. Campbell, 177 Fed. Rep. 318; Same v. Same, 173 Fed. Rep. 957.

(42) Sec. 15, of Act to Regulate Commerce as amended; Sec. 11, of Elkins Act, as amended (34 Stat. at Large, 584); Gulf, etc., R. Co. v. Helfley, 158 U. S. 98; Texas, etc. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Texas, etc., R. Co. v. Mugg, 202 U. S. 242; Texas & Pacific Ry. Co. v. Cisco Oil Co., 204 U. S. 449.

(43) Sec. 1 of Elkins Act; and sec. 1 of Act to Regulate Commerce, as amended; Van Patten v. Chicago, etc., R. Co., 81 Fed. Rep. 545, 552; Southern Ry. Co. v. Tift, et al., 206 U. S. 428; Illinois Central R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, Texas, etc., R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426.

(44) Oregon R. & Nav. Co. v. Campbell, 173 Fed. Rep. 957, 975; Knoxville v. Water Co., 212 U. S. 1, 8; Chicago, Milwaukee & St. Paul R. R. Co. v. Minnesota, 134 U. S. 418, 460.

(45) Chicago, Milwaukee & St. Paul R. R. Co. v. Ackley, 94 U. S. 179.

carrier is permitted to charge, and are conclusively presumed to be the legal rate.[46] A rule of conduct for the carrier is thus irrevocably fixed and determined in advance. It is specifically made the duty of every common carrier to observe and comply with the orders of the commission so long as the same remain in effect.[47] Rates not in excess of the maximum prescribed by the commission must be put in force by filing schedules thereof, and printing and publishing same. The use of rates not filed and published as required by law is forbidden.[48] For violation of these requirements, appropriate penalties are prescribed, but the statute does not authorize their imposition so as to amount to a deprivation of an opportunity on the part of the carrier to contest the legality of the commission's order fixing rates,[49] as jurisdiction is specifically conferred upon the commerce court to suspend the operation of the commission's orders pending a hearing in that court.[50]

In its procedure for determining the propriety of rates, the statute requires that the commission must give a "full hearing," upon reasonable notice.[51] General rules or orders for the regulation of proceedings before the commission, including forms of notices and service thereof, must conform as nearly as may be to the rules and orders in use in the courts of the United States. An interested party may require the proceedings to be public.[52]

Before the commission can determine and prescribe rates in lieu of existing rates, it must be of opinion that existing rates are unjust and unreasonable, or otherwise unlawful.[53] Reasonableness of a rate, when not involving confiscation, is its relation to surrounding facts and circumstances. This is a question of fact,[54] and is one peculiarly for the determination of the commission,[55] involving as it does the existence or creation of preferences and discriminations.[56] The interests to be considered at the inquiry are those of the public as well as of the owner of the property, together with all circumstances and conditions reasonably applicable to the situation, including rights of shippers, producers, and consumers, and the welfare of communities where traffic originates and is sent.[57] The commission must not improperly exclude facts and circumstances that ought to have been considered.[58] A carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to alter it;[59] and the order must forthwith be served on the carrier. There can be no doubt that the provisions enumerated as to notice and hearing and scope of inquiry give the carrier and interested parties all the rights they are entitled to claim under due process of law.[60]

(46) See notes 94 and 95.

(47) Sec. 16 of Act to Regulate Commerce, as amended.

(48) Sec. 6 of same Act.

(49) Secs. 6 and 16 of Act to Regulate Commerce, as amended; and sec. 1 of Elkins Act, as amended.

(50) Secs. 1 and 3 of Act to Create a Commerce Court (36 Stat. at L. 539).

(51) Sec. 15 of Act to Regulate Commerce, as amended.

(52) Sec. 17 of same Act.

(53) Sec. 15 of same Act.

(54) Illinois Central R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 455; Cincinnati, New Orleans & Texas Pacific R. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 196; Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 493; Stickney v. Interstate Commerce Commission, 164 Fed. Rep. 638, 643; affirmed in 215 U. S. 98.

(55) Cincinnati, Hamilton & Dayton Ry. Co. v. Interstate Commerce Commission, 206 U. S. 142, 154; Illinois Central R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454; New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 402; Louisville & Nashville R. R. Co. v. Behlmer, 175 U. S. 648, 675; Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry. Co., 218 U. S. 88, 110.

(56) Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R. Co., 220 U. S. 235; Atchison, Topeka & Santa Fe Ry. Co. et al., v. Interstate Commerce Commission and the United States, decided by Commerce Court, July 20, 1911, No. 2, April Session, 1911.

(57) Missouri, M. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. Rep. 645; Covington & Lexington Turnpike Co. v. Sandford, 164 U. S. 578, 597; Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 165; Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 220.

(58) Illinois Central R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 455; Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 217; Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 194; Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144.

(59) Interstate Commerce Commission v. Stickney, 215 U. S. 98, 105.

(60) Monongahela Bridge Co. v. United States, 216 U. S. 177; New York Central R. Co. v. Interstate Commerce Commission, 168 Fed. Rep. 131.

and that there is no room for the exercise of arbitrary discretion on the part of the commission. Judicial review in the commerce court is expressly provided for;[61] and the constitutional question whether a rate prescribed by the commission is so low as to amount to confiscation may be reviewed therein.[62]

The law expressly confers the rate-making power. From the nature of the power, Congress was constitutionally able to confer it. The possibility that the commission might err and fix rates below the compensatory point, does not militate against its exercise of the power within constitutional limits,[63] and no objection can be raised on this ground, when a court is open for redress, although the court will not interfere to say that rates will necessarily have a confiscatory effect, unless the case presents clearly and beyond all doubt a flagrant attack upon the rights of private property under the guise of regulation.[64] Upon an application of the commission to the commerce court for enforcement of its order, or of a carrier to have the same set aside, the commission's order is not conclusive, but only prima facie, so that the carrier, in all instances, has an opportunity to have the validity of rates prescribed for its use determined by the tribunals established and provided for by the constitution for the protection of rights of property.

The act appears to prescribe a sufficient standard for the guidance of the commission, in that it is not left to that body arbitrarily to invent a rule by which it determines what is right and proper according to its own understanding, but its action must be based upon the unreasonableness of existing rates, and the rate which it prescribes must be reasonable in and of itself and in relation to other rates and must conform in other respects to the requirements of the law. Under the operation of the principle that a legislative enactment is sufficient, which prescribes a general rule governing all cases, to become effective in specific instances upon a determination of facts by the executive, which facts it was impracticable for the legislature to determine or foresee, it follows that the Interstate Commerce Commission in prescribing rates is exercising executive power and not delegated legislative power in the strict constitutional sense.

(61) 36 Stat. at Large, 539.

(62) Southern R. R. Co. v. St. Louis Hay & Grain Co., 214 U. S. 297; Ex parte Young, 209 U. S. 123; Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418.

(63) Monongahela Bridge Co. v. United States, 216 U. S. 177, 195.

(64) San Diego Land Co. v. National City, 174 U. S. 739, 754; Knoxville v. Water Co., 212 U. S. 1; Willcox v. Consolidated Gas Co., 212 U. S. 19; Northern Pacific Ry. Co. v. North Dakota, 216 U. S. 579.

PACA OBERLIN, D. C. L.
Washington, D. C.

## SALES—CONDITIONS PRECEDENT.

### HENDRICKS et ux. v. MOCKSVILLE FURNITURE CO.

Supreme Court of North Carolina. Oct. 9, 1911.

72 S. E. 592.

Where timber, sold with the agreement that it was to be stacked for six months and delivered at a certain place, was burned before the end of the six months, there could be no recovery of the purchase price, if the contract was executory, and the title had not passed to defendant.

This action is to recover the purchase price of certain lumber, which the plaintiffs, M. J. Hendricks and wife, Emma G. Hendricks, alleged they sold to the defendant.

On the 23rd day of December, 1905, the plaintiffs and defendant entered into the following contract:

"North Carolina, Davie County. This contract made and entered into this day by and between M. J. Hendricks, of Davie county, N. C., the Mocksville Furniture Company, witnesseth: That the said M. J. Hendricks has bargained, sold to the said Mocksville Furniture Company, its successors, and does hereby bargain, sell and convey to said Mocksville Furniture Company and its successors all the oak and poplar timber—except the young trees and some for board purposes—suitable for furniture purposes on the following lands situate in Davie county, N. C., and bounded as follows, to wit: On the east by the lands of Mrs. B. C. Rich and Mrs. M. E. Tatum and Mocksville Furniture Company; on the north by the lands of Mocksville Furniture Company and Sam Eaton; on the west by the lands of Miss Mattie Eaton; on the south by the lands of J. W. Etchison and A. J. Hutchins and L. A. Furches, containing 200 acres more or less. The price to

be paid for said lumber by said Mocksville Furniture Company is $15.00 per thousand feet, less the mill culls, delivered at their factory in Mocksville, N. C., after the said lumber has been sawed and stacked by the said M. J. Hendricks for six months, and he agrees to cut and saw the whole within one year from this date. The Mocksville Furniture Company agrees to advance to said M. J. Hendricks $7.50 per thousand feet as soon as said lumber is stacked on sticks and the balance to be paid by said Mocksville Furniture Company when the same is delivered at Mocksville as aforesaid. Received of Mocksville Furniture Company $100.00 advanced on above lumber, receipt of which is hereby acknowledged. Witness my hand and seal this the 23d day of December, 1905. M. J. Hendricks. (Seal.) Emma G. Hendricks. Witness: J. Minor."

About the last of August or the 1st of September, 1907, acting under this contract, the plaintiffs had at their mill, about eight miles from Mocksville, 30,000 feet of lumber in stacks, but which had been stacked less than six months, and 2,000 feet of lumber, which had been recently sawed, and was not stacked, all of which was about that time destroyed by fire, without negligence on the part of plaintiffs or defendant. The defendant advanced to the plaintiffs $7.50 per thousand on the 30,000 feet, which had been stacked, and nothing on the 2,000 feet. Thereafter the plaintiffs delivered to the defendant 30,000 feet of lumber under said contract, upon which had been advanced $7.50 per thousand, and demanded payment of the remainder of the contract price, which the defendant refused, claiming that the plaintiffs owed it the amount it had advanced on the lumber which was burned. His honor held that under said contract the title to the lumber was in the defendant, and rendered judgment in favor of the plaintiffs for $480, being $7.50 per thousand on the 30,000 feet and $15 per thousand on the 2,000 feet, both of which lots were burned, and $7.50 per thousand on the 30,000 feet delivered, and for $32.36, which the defendant admitted it owed on other matters. The defendant excepted and appealed.

ALLEN, J. (after stating the facts as above). The determination of the controversy between the plaintiffs and the defendant depends upon the interpretation of their contract.

(1) If it is executory, and under its provisions the title to the timber was not in the defendant, there could be no liability, because it is admitted that the timber had not been stacked six months, and there was no delivery at Mocksville—material stipulations, which the plaintiffs agreed to perform. This is upon the familiar principle that one who seeks to recover upon a contract with interdependent conditions must show performance on his part. Lawing v. Rintles, 97 N. C. 350, 2 S. E. 252.

(2) As was said in Hornthal v. Howcutt, 254 N. C. 229, 70 S. E. 172: "The object of courts in the construction of a paper writing is to discover what the parties to it intended, and whether apt language has been used to give effect to that intention;" and "the intent as embraced in the entire instrument is the end to be attained, and each and every part of the contract must be given effect, if this can be done by any fair and reasonable interpretation." Davis v. Frazier, 150 N. C. 451, 64 S. E. 200.

In this last case, Justice Hoke quotes with approval Lawson on Contracts, secs. 388 and 389, as follows: "The third main rule is that that construction will be given which will best effectuate the intention of the parties, to be collected from the whole of the agreement; and, to ascertain the intention, regard must be had to the nature of the instrument, the condition of the parties executing it, and the objects which they had in view. * * * Courts will examine the whole of the contract, and so construe each part with the others that all of them may, if possible, have some effect, for it is to be presumed that each part was inserted for a purpose, and has its office to perform. So, where two clauses are inconsistent, they should be construed so as to give effect to the intention of the parties, as gathered from the whole instrument. So every word will, if possible, be made to operate, if by law it may, according to the intention of the parties."

If we apply this rule of construction, and look at the entire instrument, what did the parties intend?

The plaintiffs argue with much force that there is nothing ambiguous in the language used, and that says in express terms that the timber is conveyed to the defendant. This conclusion is reached, however, by looking at only a part of the contract, and that part, standing alone, has no consideration to support it. If the parties intended the title to the timber to pass upon the execution of the contract, it would be reasonable to expect the conveyance of the timber to be upon consideration of so many dollars, or for a certain amount per thousand feet. It no-

where appears that the defendant agreed to buy or pay for timber. It wanted lumber, and agreed to pay for it when delivered at Mocksville. The amount paid in advance is not spoken of as a payment, but an advancement.

Another circumstance which tends to show that it was not the intention of the parties that the paper writing should operate to pass the title to the timber at the time it was signed is that a part of the land on which the timber stood belonged to Mrs. Hendricks, and there is no seal to her signature, and no probate and private examination as to her. Mr. Hendricks said on his examination: "The description of the land in the contract covers about 150 acres of the lands of myself and wife." Also there is no provision allowing the defendant to enter and cut, upon failure of the plaintiffs to do so.

As it appears to us, the situation of the parties was this: The plaintiffs had timber, which they wished to sell, and the defendant needed lumber. The plaintiffs agreed to cut and saw their timber into lumber and deliver it at Mocksville for $15 per thousand feet; but, as the defendant could not use green lumber, it was stipulated that the lumber should be stacked six months before delivery, and that the defendant should advance $7.50 per thousand feet to aid in payment of operating expenses. This is, in our opinion, a proper interpretation of the contract, and, if so, it is executory, and the title to the lumber was not in the defendant at the time of the fire.

A contract, in many respects similar to the one now before us, was considered at this term, in Wiley v. Lumber Co., 72 S. E. 305. In that case plaintiff and another sold to the defendant "all the pine and gum timber of every description above the size of 12 inches at the base on a certain tract of land"; the written contract of conveyance and sale providing that defendant should have full time to have said timber cut and removed from said land, and extending in any event for such purpose to the full term of three years. The instrument also conveyed to the defendant (the grantee) the privilege to have a right of way over the grantors' lands, and to erect thereon necessary tramroads, etc., for the purpose of carrying out the timber; and there was further provision that the grantors were to cut and deliver said timber at the logbed of defendant's tramroad, and to be paid therefor at the rate of $4 per thousand, etc.; and Justice Hoke, speaking for the court, says: "Defendant is right in the position that when one has bought and paid for a lot of growing timber, and same has been conveyed him, with the privilege of removal within a given time, the contract as to the removal is so far unilateral that the purchaser is not obligated to cut and remove the timber. If he fails to do so within the time, his right or estate therein is forfeited, and inures, as a rule, to the owner of he land. We have so held in two cases at the last term. Hornthal v. Howcutt, 154 N. C. 228, 70 S. E. 171; Bateman v. Lumber Co., 154 N. C. 248, 70 S. E. 474. But the contract in question here is not of that character. Applying to it the accepted rule of construction 'that the intent of the parties as embodied in the entire instrument is the end to be attained, and that each and every part must be given effect, if this can be done by any fair and reasonable interpretation' (Davis v. Frazier, 150 N. C. 451 [64 S. E. 200]). A perusal of this entire instrument will disclose that, while it begins by reciting $450 as the consideration, the controlling stipulation of the contract provides that the parties plaintiff were to cut and deliver 'said timber' at the logbed, and the parties defendant were to pay for the same the sum of $4 per thousand feet'; and it is also expressly provided that the $450 first referred to as the consideration was only an advancement on the contract price, and to be accounted for as the timber was delivered."

There was error in the ruling of the court, and a new trial is ordered.

New trial.

NOTE.—*Delivery in Executory Contract of Sale Postponed for Benefit of Buyer.*—We do not find any cases precisely upon this point in the principal case overlooked, as we think. After giving our view as to materiality of the point, we cite some cases, which, by analogy seem to us of some bearing.

The opinion in the principal case appears to us to proceed upon a wrong theory. It considers whether or not "it was the intention of the parties that the paper writing should operate to pass the title to the timber at the time it was signed," or with delivery at Mocksville. The real question, it seems to us, is whether or not title passed with the stacking of the timber, there to remain for six months, as said provision in reference to stacking and there remaining for six months was for the timber to become seasoned. Therefore for the timber to thus remain was a provision purely in the interest of the buyer and against the interest of the seller. In other words, it would not seem that after all arrangements had been made for the timber to become seasoned and while it was in process of becoming seasoned, the increase in value ensuring to the benefit of the buyer, that a creditor of the seller could deprive the buyer of this increase he had stipulated

for. But, if he could not, this would be upon the theory that it was intended that title should then pass, and the hauling from the place to the factory was a mere condition subsequent, remediable in abatement of the price as damages if not performed.

There is no question here, however, of the rights of third parties without notice, and vendor and vendee can make whatever they wish suffice for vesting in the latter, as between themselves, any interest they intend. Lester v. East, 49 Ind. 588; Packard v. Wood, 70 Mass. (4 Gray) 307, Frazier v. Simmons, 139 Mass. 531, 2 N. E. in this case contemplated, that with the stacking in this case contemplated that with the stacking for seasoning an interest in the timber being seasoned passed, it lay with the seller whether he should attempt to convey notice to others so as to protect his rights or not.

In the Elgee Cotton Cases, 89 U. S. (22 Wall.) 180, 22 L. Ed. 863, the contract was to sell cotton to be delivered and paid for when weighed, the purchaser to furnish bagging for bailing cotton unginned, and the purchaser paid $30 to confirm this contract and immediately after the sale he employed a person to watch and take care of the cotton, but nothing further was done in execution of the contract, the ruling that no title passed is not inconsistent with the view urged in this note. The purchaser's placing a watchman over it was a precautionary measure only. He was interested in complete fulfillment of the contract, because he had made an advance on its future performance, but nothing had been done in fulfillment that inured, or was intended to inure, to his sole benefit. So it may be said of other cases where there is merely a burden on the seller, and no accrual of benefit to buyer in advance of complete fulfillment. The case of Wells-Jones Plow Co. v. Deeds & Hirsig, 1 Tenn. Ch. App. 400, presents a question not wholly unlike that here involved. The seller manufactures goods agreed on and marks and sets them apart for the vendee, has them ready to ship and offers to ship them, the goods to be paid for f. o. b. cars at the vendor's place of business. The vendee, though repeatedly requested, refuses to give shipping directions or take the goods. It was held that the vendor could claim a sale. In this case the vendor had suffered damage in part performance, and had the right to claim title had passed. That is going further than it would seem the court would be going in this case, if vendor were allowed to claim a sale.

Furthermore, it has often been decided that it is sufficient to pass title, if the goods are placed at the disposal of the buyer, who is given access to and opportunity to remove them. Smith v. State, 84 Ala. 438, 4 So. 683; Bucknam v. Nash, 12 Me. 474; Ferguson v. Arthur, 128 Mich. 297, 87 N. W. 259; Bond v. Greenwald, 4 Heisk. 453. While it may be true, that the seller in the principal case might object to doing the further hauling any sooner than the contract called for, may it not be said that it was entirely within the right of the buyer to remove stacks of timber, being there merely for seasoning, before delivery, in advance of the time for actual delivery? If so, the timber was set apart for the buyer to use at his option. Suppose examination of the timber would develop that it seasoned more rapidly than was expected, could not buyer call for its earlier delivery and, if that were refused, haul the timber from the stacks himself? It seems to us he could. C.

## BOOK REVIEWS.

### FEDERAL CORPORATION TAX.

**Mr. Thomas Gold Frost, LL. D. Ph. D., of the New York City Bar, has produced "A Treatise on the Federal Corporation Tax Law" and an appendix thereto embracing the text of the law, rules and regulations of the Treasury Department and text of other revenue laws and opinions of the Attorney General bearing on the meaning of the Federal Corporation Law.**

**The author discusses the nature of this tax enactment, its constitutionality and construction and the companies it affects, and those not coming under its provisions.**

**The volume with its extensive appendix is a very useful publication, and the decisions rendered by the Federal Supreme Court in regard to the act are very carefully considered in all their details.**

**The volume of 300 pages is gotten up in excellent style and its table of contents and index make it well adapted for ready reference. It is bound in law buckram and is published by Matthew Bender & Company, Albany, N. Y. 1911.**

## HUMOR OF THE LAW.

A man was arrested on the charge of robbing another of his watch and chain. It was claimed that he had thrown a bag over his victim's head, strangled and robbed him. There was so little evidence, however, that the judge quickly said:

"Discharged!"

The prisoner stood still in the dock, amazed at being given his freedom so soon.

"You're discharged," repeated the judge. "You can go. You're free."

Still no move from the prisoner, who stood staring at the judge.

"Don't you understand? You have been acquitted. Get out!" shouted the judge.

"Well," stammered the man, "do I have to give him back his watch and chain?"—Successful Farming.

**Hamilton Webster (called "Ham" for short) had just been elected sheriff of a county in one of the Western states. He had received strict orders to keep no prisoner in solitary confinement. One evening he found himself in possession of but two prisoners, one of whom escaped during the night.**

**The next morning Ham opened the cell of the one remaining, a man arrested for horse stealing, and proceeded to kick him out, remarking: "Git out of here, you pieface! You stayed in to get me in trouble over that derned solitary confinement regulation, didn't ye?"—Success.**

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. **Alteration of Instruments**—Erasure.—Where the name of one of the signers of a note was erased before delivery, the effect was the same as if the name had never been signed.—Hess v. Schaffner, Tex., 139 S. W. 1024.

2. **Banks and Banking**—Insolvency.—A depositor in an insolvent bank held not entitled to question the liquidation agreement, whereby another institution purchased the assets of the insolvent bank.—Wilde v. Oregon Trust & Savings Bank, Or., 117 Pac. 807.

3. **Bankruptcy**—Attorney's Fee.—A mortgagee held entitled on the mortgagor's bankruptcy to an attorney's fee for filing a petition for leave to foreclose and for representation under the trustee's petition to sell free from liens.—In re Holmes Lumber Co., D. C., 189 Fed. 178.

4.——Conversion.—That bankrupts as brokers sold the particular certificates of stock purchased for a customer does not establish a conversion and entitle the customer to follow the proceeds of such certificates, since all that was required of the bankrupts was that they keep in hand a sufficient amount of the same kind of stock for delivery to the customer.—In re A. O. Brown & Co., D. C., 189 Fed. 432.

5.——Costs.—The court would not tax costs of a successful opposition to a bankrupt's discharge against him, where he had no funds with which to pay them.—In re Kyte, D. C., 189 Fed. 531.

6.——Courts.—A receiver of a bankrupt corporation appointed by the state court, on being informed of the appointment of a receiver in bankruptcy, held bound to deliver possession of the bankrupt's property to the receiver in bankruptcy on demand.—In re J. W. Zeigler Co., D. C., 189 Fed. 259.

7.——Distribution of Estate.—Bankr. Act, § 47a(2) as amended by Act Cong. June 25, 1910, § 8, held not to conflict with section 64b(5), regulating the order of distribution of a bankrupt's estate.—In re Calhoun Supply Co., D. C., 189 Fed. 537.

8.——Evidence.—Transcript of bankrupt's testimony on examination held admissible on hearing of petition to compel bankrupt to surrender assets.—In re Greer, D. C., 189 Fed. 511.

9.——Exemptions.—The bankrupt's right to exemptions is fixed by the state or local laws where he had his domicile.—In re Bassett, D. C., 189 Fed. 410.

10.——Exemptions.—That a bankrupt, permitted to remain in possession of his stock before the election of a trustee, made sales therefrom for all of which he did not account, held insufficient to deprive him of the right to his exemptions.—In re McUlta, D. C., 189 Fed. 250.

11.——Fraudulent Purchases.—Where credit was extended to a bankrupt for goods sold to him in an assumed name he did not obtain title to the goods by fraud because of his failure to disclose his true name to his creditors.—In re McUlta, D. C., 189 Fed. 250.

12.——Preferred Claim.—Where petitioner was employed by the bankrupt to deliver milk at the bankrupt's premises with a team, he was not entitled to a preferred claim for the services of himself under Bankr. Law, § 64b (4).—Spruks v. Lackawanna Dairy Co., D. C., 189 Fed. 287.

13.——Preferences.—In determining the bankrupt's solvency at the time of an alleged preferential transfer of his property, assets, whether exempt or transferred in payment of or security for a just debt, but not assets transferred in fraud of creditors, should be considered.—Utah Ass'n of Credit Men v. Boyle Furniture Co., Utah, 117 Pac. 800.

14.——Preferences.—To render a preference voidable under Bankr. Act 1898, § 60b, there must have been an actual intention on the part of the debtor to give a preference.—Kimmerle v. Farr, C. C. A., 189 Fed. 295.

15.——Preferences.—A preferential assignment of assets of a corporation to one of its directors more than four months prior to the filing of a petition in bankruptcy held not subject to vacation under the bankruptcy act as a preference.—Jackson v. Sedgwick, C. C., 189 Fed. 508.

16.——Tenants by Entireties.—A trustee in bankruptcy of a husband has no standing to maintain a bill to restrain the husband and wife from alienating property which they hold as tenants by entireties.—Weiss v. Biehl, Pa., 81 Atl. 148.

17.——Tenants by Entireties.—Where a testator gives real estate to his daughter and her husband as tenants by entireties, a trustee of the husband has no interest in the principal or income.—In re Meyer's Estate, Pa., 81 Atl. 145.

18. **Bills and Notes**—Collateral Security.—Where a note is taken as collateral security for an existing debt, and on the faith thereof, the consideration is sufficient, and the holder is a purchaser for value and in due course of business.—Samson v. Ward, Wis., 132 N. W. 629.

19.——Non Est Factum.—One suing an administrator on a note executed by the intestate has the burden of proof on the plea of non est factum.—Radford's Adm'rs v. Harris, Ky., 139 S. W. 963.

20.——Prima Facie Case.—The production in evidence of the promissory note sued on was prima facie evidence that the maker made and delivered the note sued on to the payee.—Osborn v. Hamilton, Cal., 117 Pac. 786.

21.——Unauthorized Note.—A bank, to which an unauthorized firm note was executed, held entitled to recover against the partners upon the original obligation in the amount of such note, notwithstanding its invalidity.—First Nat. Bank v. Larsen, Wis., 132 N. W. 610.

22. **Boundaries**—Practical Construction.—Where landowners treat a fence as the division line, it will be taken as such as between the parties.—Hay v. Pierce, Ky., 139 S. W. 941.

23. **Brokers**—Earning Commission.—To entitle a broker to commissions, the purchaser procured must actually purchase upon the terms agreed, unless his failure to do so is caused by the vendor's fault.—Moore v. Councilman, Md., 81 Atl. 122.

24.——Earning Commission.—A broker having secured a purchaser for lands listed with him held entitled to his commission, even if the owner was mistaken as to the lands which the broker expected to sell.—Luce v. Ash, S. D., 132 N. W. 708.

25.——Revoking Authority.—Nothwithstanding agency to sell real estate for a commission must, under B. & C. Comp. § 797, be in writing, authority may be revoked by parol.—Peterson v. Bogner, Or., 117 Pac. 805.

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